

Below is an Opinion of the Court.


ELIZABETH PERRIS
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In re:)	Bankruptcy Case No.
)	06-32879-elp7
LAURA ROBIN LANE,)	
)	
Debtor.)	
_____)	
RODOLFO A. CAMACHO, Trustee,)	Adversary No. 06-3435
)	
Plaintiff,)	
)	
v.)	MEMORANDUM OPINION
)	
SHIRLEY LANE,)	
)	
Defendant.)	

In this chapter 7 bankruptcy case, the trustee filed this adversary proceeding to avoid a lien securing future advances made by debtor's mother to debtor prepetition, which she included in a trust deed that was recorded prepetition. The issue is whether compliance with Oregon's statute governing line of credit mortgages, ORS 86.155, is necessary in order to perfect a lien on real property

1 for future advances. For the reasons that follow, I conclude that
2 it is possible to perfect a lien securing future advances without
3 complying with ORS 86.155, and that defendant did so in this case.
4 Therefore, the trustee is not entitled to avoid defendant's interest
5 in the proceeds from the sale of the property.

6 FACTS

7 The parties have stipulated to the facts. Debtor Laura Lane
8 owned a condominium. On May 10, 2006, debtor borrowed \$7,500 from
9 her mother, who is the defendant in this case. Debtor granted a
10 trust deed on the condominium to secure the loan. Both the
11 promissory note evidencing the debt and the trust deed showed the
12 amount of the debt as \$7,500 "plus future advances." The trust deed
13 was immediately recorded.

14 By the time debtor filed her chapter 7 petition in September
15 2006, defendant had advanced debtor an additional \$21,500 pursuant
16 to the May promissory note and trust deed.

17 The condominium was sold postpetition. The trustee seeks to
18 avoid the lien on the property to the extent it secures the future
19 advances, and to preserve that \$21,500 for the estate. Defendant
20 seeks payment of the \$21,500 from the proceeds of the sale of the
21 condominium, pursuant to her trust deed.

22 ISSUE

23 Whether perfection of a mortgage or trust deed securing future
24 advances requires compliance with ORS 86.155.

25 DISCUSSION

26 The filing of a bankruptcy petition gives to the chapter 7

1 trustee "strong arm powers," including the power of a hypothetical
2 bona fide purchaser (BFP) of real property of the debtor as of the
3 commencement of the case. Bankruptcy Code § 544(a) allows the
4 trustee to avoid any interests in real property that could be
5 avoided by that hypothetical BFP. 11 U.S.C. § 544(a)(3).¹ "[S]tate
6 law determines whether the trustee's status as a BFP will defeat the
7 rights of the person against whom the trustee seeks to assert his
8 powers." In re Weisman, 5 F.3d 417, 420 (9th Cir. 1993).

9 As a hypothetical bona fide purchaser, the trustee under this
10 section is deemed to have conducted a title search, paid value
11 for the property and perfected its interest as a legal title
12 holder as of the date of the commencement of the case. . . .
13 However, the trustee's right as a bona fide purchaser does not
14 override state recording statutes and permit avoidance of any
interest of which a trustee would have had constructive notice
under state law. Thus, a trustee generally can avoid an
unrecorded transfer of land, but not after having been put on
constructive notice or inquiry of a prior claim.

15 5 Lawrence P. King, Collier on Bankruptcy ¶ 544.08 (15th ed. Rev.
16 2007)(footnotes omitted).

17 ¹ That statute provides, as relevant here:

18 (a) The trustee shall have, as of the commencement of the case,
19 and without regard to any knowledge of the trustee or of any
20 creditor, the rights and powers of, or may avoid any transfer
21 of property of the debtor or any obligation incurred by the
debtor that is voidable by --

22

23 (3) a bona fide purchaser of real property, other than
24 fixtures, from the debtor, against whom applicable law permits
25 such transfer to be perfected, that obtains the status of a
bona fide purchaser and has perfected such transfer at the time
of the commencement of the case, whether or not such a
purchaser exists.

26 11 U.S.C. § 544(a)(3).

1 Under Oregon law, a good faith purchaser of real property for
2 valuable consideration takes the property free of unrecorded
3 interests in the property. ORS 93.640(1).²

4 The trust deed in this case was recorded prepetition.
5 Therefore, the trustee as a hypothetical BFP takes subject to the
6 liens of which the trust deed gives record notice.

7 The trust deed says that it secures the payment of \$7,500 plus
8 future advances. Oregon recognizes the validity of a mortgage given
9 to secure future advances, even where the mortgage does not mention
10 future advances. Hendrix v. Gore, 8 Or. 406, 409 (1880). The fact
11 that such mortgages are valid does not answer the question of the
12 priority of future advances mortgages as against subsequent BFPs or
13 lienholders. Tyler v. Butcher, 84 Or. App. 656, 660-661 (1987)
14 (validity of mortgage lien for future advances as between mortgagor
15 and mortgagee does not determine priority of such a mortgage lien as
16 to third parties).

17 At least until 1987, when the legislature enacted ORS 86.155,

18 ² That statute provides, as relevant here:

19
20 (1) Every conveyance, deed, land sale contract, assignment of
21 all or any portion of a seller's or purchaser's interest in a
22 land sale contract or other agreement or memorandum thereof
23 affecting the title of real property within this state which is
24 not recorded as provided by law is void as against any
25 subsequent purchaser in good faith and for a valuable
consideration of the same real property, or any portion
thereof, whose conveyance, deed, land sale contract, assignment
of all or any portion of a seller's or purchaser's interest in
a land sale contract or other agreement or memorandum thereof
is first filed for record, and as against the heirs and assigns
of such subsequent purchaser.

26 ORS 93.640(1).

1 Oregon law provided that advances made under a recorded mortgage
2 that states on its face that it secures future advances had priority
3 over third parties who obtained an interest in the property after
4 the advance was made. See Tyler v. Butcher, 84 Or. App. at 661-663;
5 U.S. Nat. Bank of Portland v. Embody, 144 Or. 488, 502 (1933)("if
6 the mortgagee is not obligated to make the advances, the mortgage
7 lien attaches only to such advances as are made before notice of
8 the junior encumbrance"); Don G. Carter, "New Line of Credit
9 Mortgages and Their Use for Commercial Loans," 9 Oregon Real Estate
10 and Land Use Digest 1 (December 1987)(obligatory advances retain
11 priority of original advance; optional advances are subordinate to
12 intervening liens of which the mortgagee has actual or constructive
13 notice). See also George M. Platt, "The Uniform Land Security
14 Interest Act: Vehicle for Reform of Oregon Secured Land Transaction
15 Law," 69 Or. L. Rev. 847, 860-862 (1990). For advances made after
16 the third party had obtained an interest in the property, the
17 priority depended on whether the advances were obligatory or
18 discretionary. U.S. Nat. Bank of Portland v. Embody, 144 Or. at
19 501-502; Platt, 69 Or. L. Rev. at 861.

20 Applying that law to this case, defendant's trust deed would
21 have priority over the trustee, because the trust deed states that
22 it secures future advances, thereby giving notice of defendant's
23 interest with relation to future advances; it was recorded
24 prepetition; and the advances were made prepetition, before the
25 trustee gained the powers of a BFP who recorded his interest in the
26 property.

1 The trustee argues that the 1987 enactment of ORS 86.155
2 changed the rules with regard to mortgages or trust deeds securing
3 future advances. He asserts that ORS 86.155 gives priority to
4 mortgages or trust deeds for future advances only if the mortgage or
5 trust deed meets the statutory requirements for a "line of credit
6 instrument" as defined in ORS 86.155(1). Because the trust deed in
7 this case does not meet those requirements and therefore is not a
8 line of credit instrument as defined by the statute, he argues that
9 the trust deed does not have priority over the trustee's powers as a
10 BFP.

11 ORS 86.155(2) provides that "[a] line of credit instrument
12 shall have priority, regardless of the knowledge of the lienholder
13 of any intervening lien, as of its date of recording" as to either
14 optional or obligatory advances of principal, for interest, payment
15 of taxes and insurance and the like, and certain construction-
16 related advances. A "line of credit instrument" is defined as "a
17 mortgage or trust deed which secures a consumer or commercial credit
18 agreement³ and creates a lien on specified real property up to a
19 stated amount, provided that the front page of the mortgage or trust
20 deed" contains certain information, including stating that it is a
21 line of credit instrument, stating a maximum principal amount to be
22 advanced under the agreement, and stating a term or maturity date.

23
24
25 ³ "Credit agreement" is defined as "any promissory note,
26 loan agreement or other agreement which provides for advances
subsequent to the date of recording of the line of credit instrument
which secures such note or agreement." ORS 86.155(1)(a).

1 ORS 86.155(1)(b).⁴

2 The trustee's argument is that a mortgage or trust deed
3 securing future advances will have priority over a subsequent
4 purchaser or lienholder only if the mortgage or trust deed meets the
5 statutory requirements for a "line of credit instrument." This
6 argument is based on the premise that the legislature's granting of
7 priority to line of credit instruments means that future advances
8 instruments that do not meet the definition of line of credit
9 instruments cannot have priority under any circumstances.

10 The Oregon Supreme Court has recognized that, when the
11 legislature enacts a statute governing a particular area of the law,
12 that does not necessarily mean that the statute was intended to
13 govern all issues relating to that subject matter. See Vollertsen
14 v. Lamb, 302 Or. 489, 509 (1987)(Residential Landlord Tenant Act
15 does not govern all residential landlord/tenant disputes). The
16 question, then, is one of statutory construction: Did the
17 legislature intend compliance with ORS 86.155 to be the exclusive

18
19 ⁴ Specifically, the front page of the instrument must:

20 (A) Contain[] the legend "line of credit mortgage," "line of
21 credit trust deed" or "line of credit instrument" either in
22 capital letters or underscored above the body of the mortgage
or trust deed;

23 (B) State[] the maximum principal amount to be advanced
pursuant to the credit agreement; and

24 (C) State[] the term or maturity date, if any, of the credit
25 agreement exclusive of any option to renew or extend such term
of maturity date.

26 ORS 86.155(1)(b).

1 way for a lender to perfect and thereby gain priority for a security
2 interest securing future advances, or did it merely seek to provide
3 a fool-proof, but non-exclusive method for guaranteeing priority?

4 In interpreting Oregon statutes, the court "is to discern the
5 intent of the legislature." Portland Gen. Elec. Co. v. Bureau of
6 Labor and Indus., 317 Or. 606, 610 (1993). In doing that, a court
7 must first look at the text of the statutory provision, which
8 provides the best evidence of the legislature's intent. Id. Also
9 considered at the first level of analysis is the context of the
10 statutory provisions. Id. at 611. If the legislature's intent is
11 clear from that inquiry, "further inquiry is unnecessary." Id. If,
12 however, the statute is ambiguous, the court looks to legislative
13 history. Id. at 612.⁵ If, after considering text, context, and
14 legislative history, the meaning of the statute is still not clear,
15 "the court may resort to general maxims of statutory construction to
16 aid in resolving the remaining uncertainty." Id.

17 Here, there is nothing in the text or context of ORS 86.155 to
18 indicate whether the legislature considered compliance with this
19 statute to be the exclusive method for assuring priority for future
20 advances.

21 ⁵ It is not clear what effect, if any, the legislature's
22 2001 amendments to ORS 174.020, adding a provision that parties may
23 offer legislative history to assist the court in construction of a
24 statute, has on the Supreme Court's statutory construction
25 methodology. See State v. Rodriguez-Barrera, 2007 WL 1491869 *2-4
26 (Or. App. May 23, 2007). In this case, it does not matter at which
analytical level I consider the legislative history. Therefore, I
need not decide the effect, if any, of the amended statute on the
methodology set out in Portland Gen. Elec. v. Bureau of Labor and
Indus., 317 Or. 606 (1993).

1 The second level of analysis is the legislative history.
2 Neither party cites any legislative history. My own research did
3 not reveal any clear indication of the legislature's intent on this
4 subject.

5 House Bill 2300, which became ORS 86.155, was brought to the
6 legislature by the Real Estate and Land Use Section of the Oregon
7 State Bar. Testimony of Michael Magnus, May 19, 1987 hearing of the
8 House Judiciary Committee Subcommittee 4 at tape counter 099. As
9 originally introduced, it dealt primarily with disclosures in loan
10 documents and with the drafters' desire to limit disclosure
11 requirements to consumer loan transactions, as well as to "clarify
12 those actions which can be taken with regard to a security interest
13 (trust deed or mortgage) and the underlying debt without affecting
14 the priority of the lien on the real property security." Written
15 Testimony of Allen Brinkely, Exhibit E to April 23, 1987 hearing of
16 the House Judiciary Committee at 2.

17 The line of credit provisions at issue in this case were added
18 by amendment to that original bill. It appears that the impetus for
19 the line of credit amendment was the change in federal tax law that
20 phased out the tax deductions for interest paid on consumer debts,
21 unless the interest was on debts secured by a residential mortgage.
22 Platt, 69 Or. L. Rev. at 861-62; Carter, 9 Oregon Real Estate and
23 Land Use Digest at 1; Testimony of Michael Magnus, May 19, 1987
24 hearing before the House Judiciary Committee Subcommittee 4 at tape
25 counter 115-156; Staff Measure Analysis of HB 2300, Exhibit N to
26 June 11, 1987 hearing before the Senate Business, Housing and

1 Finance Committee. This tax law change resulted in much more home
2 equity line of credit lending. But the law in Oregon was not clear
3 about when the advances on lines of credit secured by real property
4 would have priority over intervening lienholders.

5 House Bill 2300 was intended to provide some clarification, in
6 particular to change substantive law by providing that all advances
7 made under line of credit instruments that met the requirements of
8 the statute would have priority, whether the advances were
9 obligatory or discretionary. Testimony of Allen Brinkely, April 23,
10 1987 hearing before the House Judiciary Committee Subcommittee 4 at
11 tape counter 280-314. Mr. Brinkely's written testimony explained
12 the amendment:

13 At this time a substantial number [of] financial
14 institutions are offering what are called lines of credit
15 secured by mortgage or trust deed. The consuming public has
16 found these types of loans to be convenient and useful, leading
17 to a substantial use of this service. Unfortunately, as with
18 the subject of the existing bill (modifications), there is some
19 concern that because existing Oregon cases have never had this
20 type of security instrument to review before that there [may
21 be] some confusion as to the validity or effect of this type of
22 security instrument. It should be noted that it is generally
23 felt that the courts would, if faced with the issue ultimately
24 uphold the validity of the instrument. Therefore, the statute
25 is a statement of existing law and a refinement of issues
26 relating to notice and the mechanics of reducing the line of
credit amount. There is one substantive change which is noted
in the section by section review below.

22 Written testimony of Allen Brinkely, Exhibit E to April 23, 1987
23 hearing before the House Judiciary Committee at 3. The section-by-
24 section analysis indicates that lines of credit are to include both
25 obligatory and optional advances, and that "[t]he inclusion of
26 optional advances is a modification of the existing law as

1 interpreted by most Oregon lawyers." Id. (emphasis in original).

2 The bill also provided some consumer protection, by requiring
3 specific information on the front page of the line of credit
4 instrument, and providing that the borrower could reduce the maximum
5 amount of a line of credit by giving notice to the lender.

6 The Staff Measure Analysis prepared for the House of
7 Representatives reported that the purpose of HB 2300 was to "set
8 forth what a line of credit mortgage must contain in order to
9 maintain its priority position against subsequent mortgages,"
10 including stating that it is a line of credit mortgage, stating the
11 maximum amount to be advanced, and the term of the credit agreement.
12 Staff Measure Analysis of HB 2300, Exhibit N to June 11, 1987
13 hearing before the Senate Business, Housing and Finance Committee at
14 2.

15 I conclude that the legislative history does not shed any light
16 on whether the legislature intended to displace Oregon law about
17 priorities for future advances secured by mortgages or trust deeds,
18 or to simply provide a fool-proof method for assuring priority for
19 such advances, whether optional or obligatory. The fact that the
20 legislature sought to provide more certainty and to assure priority
21 for all advances made pursuant to line of credit instruments,
22 whether obligatory or discretionary, does not tell us whether the
23 legislature intended to eliminate other pre-existing methods.

24 That leads us to maxims of statutory construction. Neither
25 party suggests any canon of construction that would assist in
26 discerning legislative intent here. That leaves us with "the maxim

1 that where no legislative history exists the court will attempt to
2 determine how the legislature would have intended the statute be
3 applied, had it considered the issue." Carlson v. Myers, 327 Or.
4 213, 225 (1998). Here, the legislature seemed concerned with
5 providing certainty to lenders making line of credit loans. There
6 is no indication that the legislature would have intended to
7 preclude perfection of future advances security interests under the
8 existing law, as uncertain as that might be in some circumstances.

9 In considering a similar issue under New York law, the
10 bankruptcy court in New York provided a succinct analysis, which I
11 find useful:

12 [The statute] establishes an inclusive rather than an exclusive
13 standard for lien perfection. Compliance with this statute is
14 like hitting a home run in baseball. It assures a score, but
15 there are other ways to be safe at home. The relevant text
16 simply recites that a credit line mortgage "shall secure not
17 only the original indebtedness but also the indebtedness
18 created by future advances thereunder made within twenty years
19 from the date of the recording" The language of this
20 section, however, does not imply the negative. Nothing in the
21 text establishes that advances before recordation are
22 necessarily unsecured. Such pre-recording advances will not
23 receive the benefit of [the state statute], but instead, their
24 secured status will depend upon established case authority.

25 In re Brosnahan, 312 B.R. 220, 224 (Bankr. W.D.N.Y. 2004).

26 Applying a similar approach here, I conclude that it is likely the
Oregon legislature did not intend compliance with ORS 86.155 to be
the exclusive method of assuring priority for future advances.
Instead, it appears that, if the legislature had considered the
issue, it would have intended merely to provide a method to assure
certainty for those lenders who chose to comply with the statute
(particularly institutional lenders), but not to deprive those who

1 would have had priority under existing law from the benefit of that
2 existing law.

3 This is the understanding of Oregon law held by the drafters of
4 the Restatement (Third) of Property (Mortgages). In the list of
5 state statutes relating to future advance clauses in mortgages, the
6 footnote accompanying the Oregon statutory listing of ORS 86.155
7 says:

8 Since the statute applies only if the mortgage is given a
9 specific title, the parties may avoid the statute by omitting
10 the relevant language. In the absence of statute, Oregon holds
11 that a mortgage may secure future advances whether its wording
12 so provides or not. However, if optional advances are made,
13 they will have priority over intervening encumbrances only
14 [under certain circumstances]. Tyler v. Butcher, 734 P.2d 1382
15 (Or.Ct.App.1987).

16 Restatement (Third) of Property (Mortgages) § 2.1, Statutory Note on
17 Future Advances n.39 (1997).

18 The recorded trust deed in this case said that it secured not
19 only \$7,500, but also future advances. That recorded trust deed
20 gave constructive notice to subsequent purchasers or lienholders
21 that future advances were secured.⁶ Even if it did not provide

22 ⁶ The trustee submitted Exhibit 4, which is a copy of a
23 title report prepared on June 22, 2006. That report shows that
24 defendant's trust deed secured an amount of \$7,500 plus "any other
25 obligations secured thereby[.]" The trustee argues that he should
26 be able to rely on the title report and not have to review each
document that is of record to see if there are additional
obligations secured by the security instrument. Title reports are
merely the title company's interpretation and summary of the real
property records. Constructive notice includes "notice chargeable
under the recording statute, ORS 93.710[.]" Gorzeman v. Thompson,
162 Or. App. 84, 93 (1999). ORS 93.710(1) provides, in part, that
recordation of an instrument creating certain interests in real
(continued...)

1 record notice of the amount of future advances secured by the trust
2 deed, it certainly gave rise to inquiry notice. Such notice "arises
3 when the existence of a claimed interest in real property may be
4 determined through investigation based on facts available to the
5 claimant that would cause a reasonable person to make such inquiry."
6 Gorzeman v. Thompson, 162 Or. App. at 93 (priority not limited to
7 face value of security instrument where amount on its face was so
8 low as to trigger inquiry by reasonable person). Accord High v.
9 Davis, 283 Or. 315, 333-334 (1978)(recorded instrument that was not
10 properly acknowledged and did not clearly describe the property
11 encumbered gave rise to duty to inquire to determine the extent of
12 the interest claimed). A reasonable person in the trustee's
13 position as a purchaser of the property would have questioned the
14 future advances language in the trust deed and, because the advances
15 had been made before debtor filed bankruptcy, the amount secured by
16 the trust deed would have been discovered on inquiry.

17 This result is consistent with the purpose of the trustee's
18 strong arm powers, which is to cut off unperfected security
19 interests and other undisclosed prepetition claims, thereby
20 furthering the goal of equalizing distribution of a debtor's assets

21 _____
22 ⁶(...continued)
23 property "constitutes notice to third persons of the rights of the
24 parties under the instrument[.]" Thus, it is the instrument that
gives notice, not any title report summarizing what the record
shows.

25 Because the trust deed in this case was recorded, it gave
26 constructive notice that the trust deed secured both the original
loan of \$7,500 and the future advances.

1 among unsecured creditors. The trust deed here was recorded; it
2 showed on its face that it secured future advances. Therefore,
3 defendant's interest in debtor's real property was not a secret, but
4 could be discovered by looking in the property records and inquiring
5 as to the amount, if any, of advances made prepetition under the
6 future advances clause.

7 CONCLUSION

8 The recorded trust deed secured the future advances made by
9 defendant to debtor prepetition. The trustee is not entitled to
10 avoid the lien securing the future advances. Therefore, defendant
11 is entitled to judgment on the trustee's avoidance action.